

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

October 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-1746-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JOHN E. LOWTHER III,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.*

SNYDER, J. John E. Lowther III, appeals from a judgment of conviction imposing an enhanced penalty under § 939.62, STATS., and from a postconviction order denying his motion to vacate that portion of his sentence. Lowther contends that the repeater portion of his sentence was unsubstantiated by his admission or by required proof.

The basic facts are undisputed. Lowther was convicted of one count of battery contrary to § 940.19(1), STATS., a Class A misdemeanor. The criminal complaint alleged that Lowther was subject to a penalty enhancement as a repeat offender under § 939.62(1)(a), STATS., exposing him, inter alia, to three years incarceration if convicted of the charge. Lowther pled no contest to the battery charge, and the trial court dismissed two other misdemeanor charges at the request of the State.<sup>1</sup> The trial court sentenced Lowther to prison for a period of nine months, the maximum under a Class A misdemeanor, plus a nine-month penalty enhancement.

The appellate issue raised by Lowther is whether the trial court erred, as a matter of law, in imposing the penalty enhancer under § 939.62, STATS. Lowther contends that: (1) he did not specifically admit to any prior convictions that support the sentence enhancement, *see State v. Farr*, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984), and (2) the State did not present proof of the alleged prior convictions sufficient to support the enhancement. *See State v. Koeppen*, 195 Wis.2d 117, 127, 536 N.W.2d 386, 390 (Ct. App. 1995). The State has not responded.

Failure to file a respondent's brief tacitly concedes that the trial court erred. *State v. R.R.R.*, 166 Wis.2d 306, 311, 479 N.W.2d 237, 239 (Ct. App. 1991). We accept the State's concession that Lowther was improperly sentenced under the penalty enhancer provision and reverse the trial court order denying

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<sup>1</sup> In the same criminal complaint, Lowther had also been charged with criminal disorderly conduct and misdemeanor bail jumping on the same date as the battery.

the postconviction relief requested. Accordingly, we remand and direct that the portion of Lowther's sentence attributable to his alleged status as a repeat offender be vacated. The judgment in all other respects shall stand as the law of the case.

*By the Court.*—Judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.